

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1078 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?4 Whether this case involves a substantial
question of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SURESH C SHAH

Versus

FOOD CORPORATION OF INDIA & ANOTHER

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Appearance :

MR CL SONI for Petitioner.

MR YF MEHTA for Respondents.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 28/09/2006

ORAL JUDGMENT

By filing this petition, the petitioner has challenged the legality and propriety of the orders at Annexures 'G' and 'I' .

Annexure 'G' is an order dated 04.07.85 passed by the Senior Regional Manager of the respondent Food Corporation of India [for brevity, hereinafter referred to as the 'Corporation'] by which penalty of stoppage of two annual increments with cumulative effect was imposed upon the petitioner. It was also further provided in the said order that the period of suspension and deemed suspension of the petitioner will be treated as period spent not on duty and pay and allowance of the petitioner was restricted to the subsistence allowance already paid to him.

So far as annexure-I is concerned, the same is an order passed by the very authority, i.e., Senior Regional Manager of respondent Corporation, which is dated 03-09-85, whereby the authority has passed a fresh order in supersession of the earlier order dated 04.07.85. By the aforesaid order, Senior Regional Manager has modified the order of penalty passed by him earlier, by which the pay of the petitioner was reduced by two stages from Rs.485 to Rs.455 in the time scale of pay of Rs.290-485 for a period of two years with immediate effect. A further direction is also given in the order that the petitioner will not earn increments of pay during the period of reduction and that on the expiry of the period, the reduction will not have the effect of postponing his future increments of pay. It is also provided that the period of suspension and deemed suspension of the petitioner will be treated as period spent not on duty and pay and allowance of the petitioner was restricted to the subsistence allowance already paid to him.

The petitioner was appointed as Assistant Grade III in the Corporation by order dated 16.08.66. While the petitioner was in service, he was subjected to a criminal case in connection with an

incident dated 13.11.77 on the ground that he was involved in a case of theft of 100 gunny bags of Wheat belonging to the Corporation. In substance, it was alleged that the petitioner, along with others, was in charge of safe transport of wheat at Viramgan Depot and the petitioner issued advance chit for Truck No. GTH 7485 which was found unloading 100 bags of wheat at Nutan Flour Mills at Ahmedabad instead of FCI Depot at Viramgam. In view of the pendency of the case, the petitioner was put under suspension by order dated 16.11.77. Ultimately, the petitioner was convicted by learned Judicial Magistrate, First Class by judgment and order dated 30.08.79 and sentenced to suffer imprisonment for six months and fine. In view of the conviction and sentence, the petitioner was dismissed from service on 18.10.79. The petitioner challenged the said order of conviction by filing Criminal Appeal No. 65 of 79 before the learned District and Sessions Court, Ahmedabad Rural and by judgment and order dated 04.05.80, the petitioner was acquitted by giving him benefit of doubt. The State preferred appeal against the order of acquittal by filing Criminal Appeal No. 840 of 80, which was dismissed by the High Court on 25.11.82.

In view of the acquittal order passed by the District and Sessions Court, the petitioner was taken back in service, vide order dated 28.06.80, Annexure 'B'. However, a departmental inquiry was directed to be held against the petitioner under the Food Corporation of India [Staff] Regulations, 1971 [hereinafter referred to as the Regulation] in connection with the incident in question and the petitioner, who was under suspension, was ordered to continue to remain under suspension under section (4) of Regulation 66 of the Regulation till further orders. Accordingly, the petitioner was placed under deemed suspension by the order dated 28.06.80. However, by order dated 9th March 1983, the suspension order was revoked under sub-regulation 5(a) of regulation 66 of the Regulations and the petitioner was ordered to report for duties. The

said order by which the suspension order was revoked is finding place at page 43, Annexure 'C' of the compilation of this petition. However, by order dated 08.06.84, Annexure 'D', it was decided that no increment be drawn for the period of suspension unless the period of suspension is regularized as on duty on finalization of the disciplinary proceedings.

As per the Enquiry Report, pages 61-78, out of 5 charges, only one charge, i.e. charge No.4, was held to be proved, i.e. to the effect that the petitioner brought truck No. GTH 7485 loaded with 100 bags of FCI wheat at Ambika R. Fl. Mills. Ahmedabad with malafide intention. Rest of the charges were held not proved. On the basis of the Inquiry Officer's report, the Disciplinary Authority has passed an order dated 04.07.85, Annexure 'G', by which penalty of stoppage of two annual increments with cumulative effect was imposed upon the petitioner. It was also further provided in the said order that the period of suspension and deemed suspension will be treated as period spent not on duty and pay and allowance of the petitioner was restricted to the subsistence allowance already paid to the petitioner. The aforesaid order of penalty was challenged by the petitioner by way of Departmental Appeal. However, in the meanwhile, the disciplinary authority passed another order dated 03.09.85 in supersession of the earlier order dated 04.07.85, Annexure 'I' by which penalty of reduction to a lower stage in time scale was imposed whereby the pay of the petitioner was reduced to Rs.455/- for a period of two years with immediate effect. By the said order dated 03.09.85, the pay of the petitioner was reduced by two stages from Rs.485/- to Rs.455/- for a period of two years with immediate effect. The said order also provided that the petitioner will not earn increments of pay during the period of reduction and on expiry of the period, the reduction will not have the effect of postponing his future increments of pay. It was also further provided in the said order that the period of suspension and deemed

suspension will be treated as period spent not on duty and pay and allowance of the petitioner was restricted to the subsistence allowance already paid to the petitioner. Accordingly, the very same authority has revoked the earlier order dated 04.07.85 by passing a fresh order on 03.09.85. In view of the subsequent order, the appeal filed against the first order was disposed of as having become infructuous.

The petitioner has challenged the orders at Annexure 'G' and Annexure 'I' by way of the present petition.

Mr. C.L. Soni, learned advocate appearing for the petitioner vehemently argued that once an order at Annexure 'G' was passed, the very same authority could not have enhanced the penalty by passing a fresh order at Annexure 'I'. It is further submitted that the authority after having passed the first order, has become functus officio and the said order can be reviewed or penalty can be enhanced only by the appellate authority and not by the very same authority. It is submitted that on the aforesaid ground, the impugned at Annexure "I" is without jurisdiction and is required to be quashed and set aside.

Mr. Soni further submitted that even the first order Annexure 'G' is bad in law as after acquittal of the petitioner, no departmental inquiry should have been initiated in connection with the same incident. It is further submitted by Mr. Soni that by the impugned order at Annexure I, the disciplinary authority has inflicted a major penalty. However, procedure for imposing major penalty is not followed. It is submitted that as per the regulation, before imposing major penalty, the Inquiry Report is required to be given which is a mandatory procedure, but the said procedure was not followed obviously because initially the authority had awarded only minor penalty. It is submitted that on the aforesaid ground also, the order

at Annexure 'I' is required to be quashed and set aside. It is also submitted that even the original order of penalty at Annexure 'G' is also required to be quashed and set aside as it is a case of no evidence. It is also submitted that at the time of regularization of suspension period, the petitioner was not given any hearing and the entire suspension period was to be treated on duty, and periodical increments were required to be released during suspension period. It is further submitted that after the order of acquittal by the Court, the subsequent period was required to be treated to be on duty, and for that period, periodical increments were required to be released in favour of the petitioner.

Learned advocate Mr. Y.F. Mehta on the other hand submitted that since the petitioner was given benefit of doubt by the criminal court, it was open to the Corporation to hold disciplinary proceedings against the petitioner even after the order of acquittal. Mr. Mehta further submitted that in the departmental inquiry, even if there is some evidence, penalty order can be passed and this Court in exercise of its extra ordinary jurisdiction under Article 226, may not re-appreciate the evidence on record. As regards the power of the disciplinary authority to review its own order, Mr. Mehta submitted that he is not in a position to submit anything in support of the said order. Mr. Mehta however submitted that the appellate authority or Corporation itself could have enhanced the penalty order or reviewed the penalty order.

I have heard both the learned advocates and have also gone through the bunch of papers forming part of this petition. It is not in dispute that after the acquittal of the petitioner, the petitioner was subjected to disciplinary proceedings in connection with the same incident for which the criminal proceedings were initiated against him. On the conclusion of the inquiry, the disciplinary authority, Senior Regional Manager of the respondent Corporation passed an

order dated 04.07.85 by which penalty of stoppage of two annual increments with cumulative effect was imposed upon the petitioner. By the said order that the period of suspension and deemed suspension was treated as period spent not on duty and pay and allowance of the petitioner was restricted to the subsistence allowance already paid to the petitioner. Subsequently the very same authority has passed another order dated 03.09.85 in supersession of the order dated 04.07.85, by which penalty of reduction to a lower stage in time scale was imposed whereby the pay of the petitioner was reduced to Rs.455/- for a period of two years with immediate effect. By the said order the pay of the petitioner was reduced by two stages from Rs.485/- to Rs.455/- for a period of two years with immediate effect. The said order also provided that the petitioner will not earn increments of pay during the period of reduction and on expiry of the period, the reduction will not have the effect of postponing his future increments of pay. The said order also provided that the period of suspension and deemed suspension will be treated as period spent not on duty and pay and allowance of the petitioner was restricted to the subsistence allowance already paid to the petitioner.

It is, no doubt, true that the petitioner has preferred appeal against the earlier order dated 04.07.85 but in the meanwhile the disciplinary authority reviewed his own order and passed another order. So far as the second order dated 03.09.85 is concerned, it is not in dispute that a major penalty is imposed on the petitioner. As per clause (v) and (vi) of Regulation 54, a copy of which is placed on the record, reduction to a lower stage in the time scale of pay or post for a specified period is a major penalty. Regulation 58 provides for procedure for imposing major penalties. Regulation 59 provides for action on the inquiry report. Clause 4 of Regulation 59 provides as under:

“59.(4)(i). If the disciplinary authority having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clauses (v) to (ix) of regulation 54 should be imposed on the employee, it shall :

- (a). furnish to the employee a copy of the report of the inquiry held by it and its findings on each article of charge, or, where the inquiry has been held by an inquiring authority appointed by it, a copy of the report of such authority and a statement of its findings on each article of charge together with brief reasons for its disagreement, if any, with the findings of the inquiring authority;
 - (b). give to the employee a notice stating the penalty proposed to be imposed on him and calling upon him to submit within fifteen days of receipt of the notice or such further time not exceeding fifteen days, as may be allowed, such representation as he may wish to make on the proposed penalty on the basis of the evidence adduced during the inquiry held under regulation 58.
- (ii). The disciplinary authority shall, after considering the representation, if any, made by the employee, determine what penalty, if any, should be imposed on the employee and make such order as it may deem fit. “

Considering the aforesaid, it is clear that in case major penalty is to be inflicted, report of the inquiry officer is required to be furnished to the employee with the findings of the inquiry officer and thereafter an opportunity to show cause regarding proposed penalty is also required to be afforded to the employee. In the instant case, it is as such not in dispute that before passing the subsequent penalty order dated 03.09.85, the said procedure was not followed

obviously because by the first order at Annexure 'G', the petitioner was awarded minor penalty wherein such requirement was not required to be followed. Therefore, assuming that the authority had power to revoke or review its own order, yet without following the prescribed procedure for imposing major penalty by giving Enquiry officer's report and notice as provided under clause 59(4)(b) of the Regulation, major penalty could not have been imposed. On this ground, the order at Annexure 'I' is required to be quashed and set aside.

It is also required to be noted that once the disciplinary authority passes an order imposing penalty, it becomes *functus officio* and under the Regulation, only appellate authority or the Corporation itself could have enhanced the order by reviewing the order of the disciplinary authority but the very same disciplinary authority which imposed a penalty could not have enhanced the penalty by a subsequent order in supersession of the earlier order of penalty. Under the Regulation, no such powers are available nor Mr. Mehta is in a position to point out any such powers. The said order is, therefore, illegal and without any authority of law and on that ground also, the order dated 03.09.85 at Annexure 'I' is required to be quashed and set aside.

It is, however, required to be noted that Mr. Mehta tried to rely upon Regulation No. 74 and tried to salvage the situation by arguing that the Corporation can review an order. Regulation 74 reads as under:

“74.(1). Notwithstanding anything contained in these regulations, the Corporation may, at any time, either on its own motion or otherwise, call for the records of any inquiry and review any order made under these regulations, and

- (a). confirm, modify or set aside the order; or
- (b). confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or
- (c). remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or
- (d). pass such other orders as it may deem fit;

provided that no order imposing or enhancing any penalty shall be made by the reviewing authority unless the employee concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in clause (v) to (ix) of Regulation 54 or to enhance the penalty imposed by the order sought to be viewed to any of the penalties specified in those clauses; no such penalty shall be imposed except after an inquiry in the manner laid down in regulation 58 and after giving a reasonable opportunity to the employee concerned of showing cause against the penalty proposed on the evidence adduced during the inquiry.

(2). No proceeding for review shall be commenced until after:

- (i). the expiry of the period of limitation for an appeal, or
- (ii). The disposal of the appeal, where any such appeal has been preferred

(3). An application for review shall be dealt with in the same manner as if it were an appeal under these regulations.

(4). Powers similar to those specified in clause (1) above

may be exercised by the Managing Director, Zonal Manager and Regional Manager (Additional/Joint Manager) in respect of orders passed by authorities subordinate to them.

Reading the above Regulation, it is very clear that powers of review are only with the Corporation, and not with the disciplinary authority. Even clause (c) provides that reviewing authority can remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper. Under the proviso to the said Regulation it is also provided that no order imposing or enhancing any penalty shall be made by the reviewing authority unless the employee concerned has been given a reasonable opportunity of making a representation against the penalty proposed. The said Regulation also provides that no proceeding for review shall be commenced until after the expiry of the period of limitation for an appeal or disposal of the appeal where such appeal has been preferred, meaning thereby that when the appeal is pending, even the Corporation also cannot review the original order, and it is also clear from the said Regulation that review is to be dealt with in the same manner as if it were an appeal under these regulations. Reading the afore said Regulation, it is even otherwise clear that even the reviewing authority which has the power to review cannot review the order when an appeal is pending and even the reviewing authority which is empowered to review cannot enhance the penalty without giving reasonable opportunity. In the circumstances even if the Corporation itself has passed an order enhancing penalty, that order would be also bad if the same was passed without giving reasonable opportunity to the delinquent / employee concerned and even that could not have been done when an appeal was pending. As against that, in the instant case, in a proceedings initiated for imposing minor penalty, the very same authority, which was disciplinary

authority, has reviewed its own order and awarded a major penalty during the pendency of the appeal and that too without giving any notice or opportunity to the delinquent employee. In that view of the matter, the only conclusion which can be reached is that the order of the disciplinary authority enhancing the penalty is passed without any authority of law, and contrary to the Regulations, and, therefore, the same is not sustainable.

Now the question which is required to be considered is, whether the first order dated 04.07.85 at Annexure 'G' is legal or valid? In this connection, so far as the said aspect is concerned, it is required to be noted that initially the petitioner preferred an appeal against the first order, but since in the meantime the subsequent order dated 03.09.85 was passed, the appeal became infructuous. It is no doubt true that after acquittal of the petitioner for the very same charges, departmental inquiry is initiated and the appeal was disposed of without deciding the same on merits as the same became infructuous. However, Mr. Soni, after taking instructions from the petitioner, has fairly submitted that his client is not interested in challenging the order of punishment by again going to the appellate authority, and accordingly, the order of penalty of stoppage of two annual increments with cumulative effect is being accepted by the petitioner. He, however, submitted that once the petitioner was already taken back in service after his acquittal by the competent Criminal Court, he could not have been kept under deemed suspension and in any case, his suspension was required to be regularized by treating the entire period on duty and at least his periodical increments during such period was required to be released. It is submitted that suspension period was required to be regularized by treating him on duty or at least at the time of deciding such question, hearing was required to be given to the petitioner which was not given. In this connection, learned advocate Mr. Soni relied on the judgment in the case of DEPOT MANAGER, A.P.S.R.T.C

HANUMAKONDA vs. VENKETESWARULU reported in AIR 1955 SC 258.

In the said case, it is held by the Supreme Court in paragraph 4 that it is open to the competent authority to withhold payment of full salary for the suspension period on justifiable grounds and the employee is required to be given a show cause notice in respect of the proposed action and his reply taken into consideration before passing the final order. In the instant case, before passing the order for treating the entire period of suspension and deemed suspension as period spent not on duty, the petitioner was not heard. In my view, therefore, the said order is not sustainable.

Under the circumstances, the order at Annexure 'I' is quashed and set aside. So far as the order at Annexure 'G' is concerned, the penalty of stoppage of two annual increments with cumulative effect was imposed upon the petitioner is not disturbed in view of the statement made by the learned advocate for the petitioner that the petitioner is not pressing his prayer for setting aside the aforesaid order of penalty. However, the part of the order whereby the period of suspension and deemed suspension was treated as period spent not on duty and restricting pay and allowance of the petitioner to the subsistence allowance already paid to the petitioner is quashed and set aside as the said order is passed without giving an opportunity of hearing. It is held that the entire the period of suspension and deemed suspension shall be treated as period spent on duty and it is directed that the petitioner shall be entitled to regular increments during the entire period of suspension. It is clarified that after acquittal of the petitioner in the criminal case for the subsequent period he will be entitled to full salary during the said period as if he was on duty but for the period between his suspension till his acquittal, he shall be treated not on duty and for that period he will be entitled to subsistence allowance only. The respondents are directed to release all increments for the purpose of retiral dues and all other benefits. The authorities shall calculate the

retiral dues as well as the amount payable to the petitioner for the period directed to be treated on duty by this order, and make payment thereof within a period of one month from today.

Rule is made absolute accordingly. No order as to costs.

[P. B. MAJMUDAR, J.]

mathew